**Workplace Safety and Insurance Appeals Tribunal**

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**Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail**

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Ontario

# Workplace Safety and Insurance Appeals Tribunal

## Quarterly Production and Activity Report

## January 1 to March 31, 2011

Production Summary ..... 2
Production Tables and Charts ..... 3
Judicial Review Activity ..... 6
Recent Decisions ..... 18

## Production Summary

- At the end of the first quarter 2011, the active inventory totalled 3,907. This represents the tenth consecutive quarter where the level has remained relatively stable. During this period, the inventory has fluctuated very little (+/- 5%) as compared with its current level.

- Incoming appeals numbered 1126, of these 892 were appeals from WSIB decisions and 234 appellants advised they were ready to proceed to hearing following a period of inactive status.

    - This compares to 887 new appeals and 110 reactivated appeals recorded in the fourth quarter of 2010.
    - In the 1st quarter of 2010 the Tribunal recorded 864 new appeals and 172 reactivations.
    - In 2010, the weekly average of hearing-ready appellants was 56. For Q1-2011, the weekly average of hearing-ready appellants is 67. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 995. This includes 290 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts and 705 after-hearing dispositions; of the after-hearing dispositions, 688 followed from Tribunal decisions.

- At the end of Q1-11, the inactive inventory was 2,954 cases (at the end of Q4-10, the inactive inventory was 3,159 cases).

- In Q1-11, 86% of final decisions were released within 120 days. In 2010, 86% of final decisions were released within 120 days.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the first quarter of 2011, the notice inventory included 1,400 dormant cases, the active inventory totalled 3,907cases, and the inactive inventory totalled 2,954 cases.

## Production Tables and Charts

A. Active Inventory end of Quarter

| Period | Active Inventory |
|---|---|
| Q1-2010 | 3865 |
| Q2-2010 | 3862 |
| Q3-2010 | 3877 |
| Q4-2010 | 3859 |
| Q1-2011 | 3907 |

B. Incoming Appeals

| Period | Incoming Appeals |
|---|---|
| Q1-2010 | 1036 |
| Q2-2010 | 1022 |
| Q3-2010 | 998 |
| Q4-2010 | 997 |
| Q1-2011 | 1126 |

C. Dispositions

| Period | Dispositions – total | Pre-hearing | After Hearing |
|---|---|---|---|
| Q1-2010 | 1018 | 326 | 692 |
| Q2-2010 | 943 | 319 | 624 |
| Q3-2010 | 914 | 312 | 602 |
| Q4-2010 | 1034 | 326 | 708 |
| Q1-2011 | 995 | 290 | 705 |

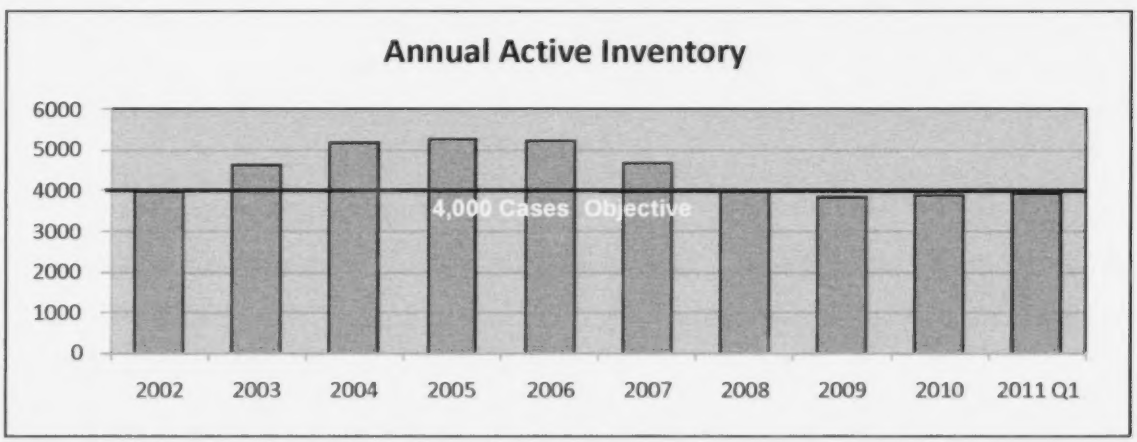
D. Inactive Inventory

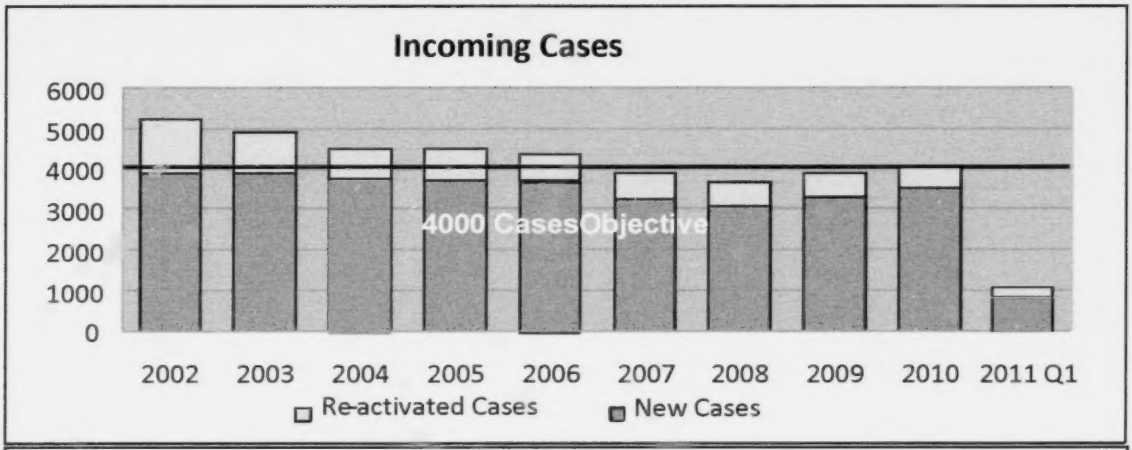
| Period | Inactive Inventory |
|---|---|
| Q1-2010 | 3321 |
| Q2-2010 | 3274 |
| Q3-2010 | 3215 |
| Q4-2010 | 3159 |
| Q1-2011 | 2954 |

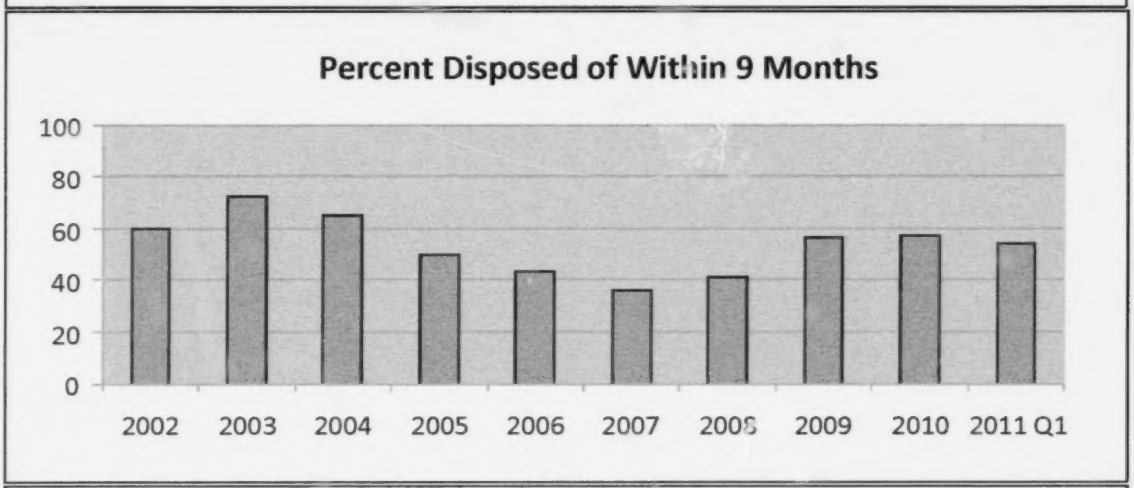
E. Notice of Appeal (Dormant cases)

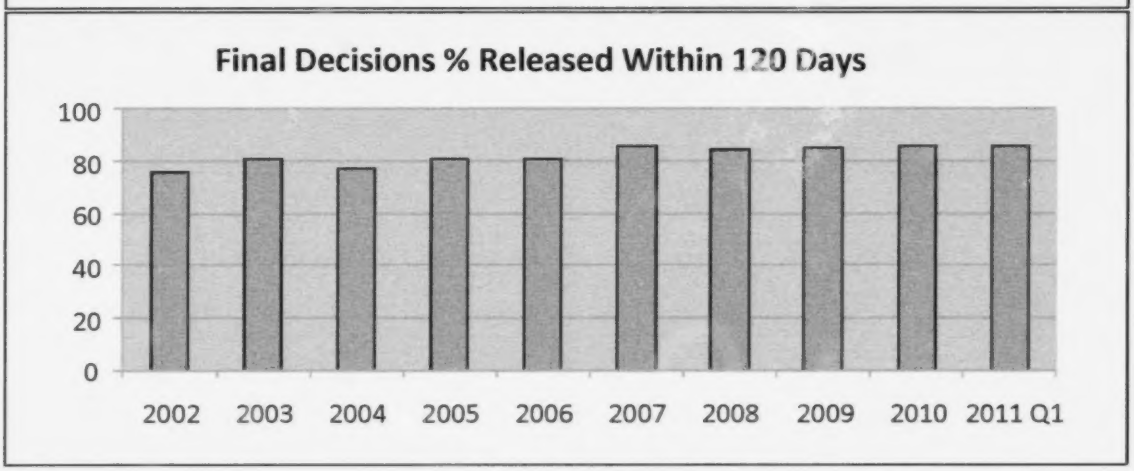
| Period | Total Dormant | Change from previous quarter |
|---|---|---|
| Q1-2010 | 1185 | -16 |
| Q2-2010 | 1267 | 82 |
| Q3-2010 | 1335 | 68 |
| Q4-2010 | 1317 | -18 |
| Q1-2011 | 1400 | 83 |

F. Production Charts: Annual from 2002 up to the end of the current quarter




Incoming Cases
6000
5000
4000
3000
2000
1000
0
4000 CasesObjective
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011 Q1
Re-activated Cases
New Cases


Percent Disposed of Within 9 Months
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011 Q1


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011 Q1

## Judicial Review Activity

**First Quarter 2011**

The status of applications for judicial review involving the Tribunal for the first quarter of 2011 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

**1. Decisions Nos.1007/08 (May 9, 2008) and 1007/08R (October 20, 2008)**

The worker, a police officer, was granted entitlement for a neck and back/shoulder injury in 1975. In 1979 he suffered injuries to his chest, neck, upper back and left shoulder, for which he was granted a 10% permanent disability award. He injured his low back in 1986, for which he was granted two weeks of benefits. In 1999 an ARO granted the worker entitlement for a stomach ulcer caused by his pain medication, but denied ongoing entitlement for his low back from the 1986 injury. In a 2003 ARO decision the worker was denied an increase to his 10% pension. In a 2006 ARO decision the worker was denied ongoing entitlement for his shoulder and neck from the 1975 accident, a permanent disability award arising from that accident, and also denied a pension assessment for his ulcer.

The worker appealed to the Tribunal for:

1) ongoing entitlement and a pension assessment for the 1975 left shoulder and neck injury;
2) entitlement to a pension assessment for a stomach ulcer and stomach surgery from the 1979 injury;
3) a pension award for neck and shoulder injury under the 1979 injury;
4) an increase in the 10% pension award for his back and shoulder from the 1979 injury;
5) a pension assessment for a back condition from the 1986 injury.

The worker's appeal was denied. The Vice-Chair found that there was no ongoing entitlement for a shoulder and neck injury, and no entitlement for a pension assessment from the 1975 accident. The medical evidence indicated there were no ongoing problems that were related to this accident.

Similarly the Vice-Chair found there was no entitlement to a pension for the worker's stomach ulcer or stomach surgery from the 1979 accident because there was no ongoing disability related to his stomach. There was no entitlement for a pension for his neck and left shoulder because there was no objective evidence of an organic impairment. The 10% award for the thoracic spine and intrascapular left shoulder remained appropriate as it reflected the worker's level of disability.

The Vice-Chair also held there was no ongoing entitlement for the 1986 accident, and hence no pension assessment was in order.

The worker's application for reconsideration was denied.

The worker commenced an application for judicial review, arguing all above issues except for issue #2. The respondent employer police department participated in the judicial review as a co-respondent with the Tribunal.

The judicial review was heard on February 17, 2011. The Panel of Justices Cunningham, Swinton and Herman unanimously dismissed the judicial review.

At the start of the hearing the Applicant narrowed the issues in the case to ongoing entitlement for only the 1975 accident. The Court found the Tribunal had appropriately considered all of the evidence, including the medical evidence. The Applicant's arguments that the Tribunal had misapprehended certain medical reports was not accepted.

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A month after the release of this decision, counsel for the Applicant filed a notice of appeal to the Court of Appeal. The Applicant took the position that leave to appeal a decision of the Divisional Court was not required on a question of fact alone. His appeal was served and filed with the Court of Appeal.

The Tribunal disputed the Applicant's interpretation of section 6(1) of the *Courts of Justice Act*. The Deputy Registrar of the Court of Appeal agreed and stayed the appeal until the worker abandons the appeal or one of the respondents takes further action to strike the appeal.

**2. Decisions Nos.565/09 (December 8, 2009) and 565/09R (March 9, 2010)**

In this right to sue case, a husband and wife shared driving duties in a transport truck. The wife was involved in a single vehicle accident. She and her husband were both injured, her husband sustaining severe injuries. Two insurance companies both brought section 31 applications for declarations that the husband and wife had their right to sue taken away under the Act. The husband had died by the time of the Tribunal hearing and his estate was a respondent. His wife was the other respondent.

The Vice-Chair found the right of action of both husband and wife was taken away, as they were both workers employed by a Schedule 1 employer and in the course of employment at the time of the accident. The husband's application for reconsideration was denied.

The husband's estate commenced an application for judicial review of the Tribunal's decisions. The Tribunal and an insurance company were co-respondents. The judicial review was scheduled to be heard in Sudbury in March 2011.

Shortly before the scheduled court date, the Tribunal and the co-respondent insurance company consented to allow the Applicant to abandon the judicial review.

**3. Decision Nos.1791/07 (August 28, 2007), 1791/07R (March 3, 2008) and 1791/07R2 (September 21, 2009)**

The worker, a kitchen helper, injured his neck in November 2004. He was granted LOE benefits from May 9, 2005 until the end of 2010. Entitlement was extended to include his low back, shoulders, and chronic pain disability. The worker was also granted a 45% NEL award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psycho-traumatic disability, and the amount of a NEL for chronic pain. The Tribunal held that the worker had no entitlement for carpal tunnel syndrome, that he was not entitled to a psycho-traumatic award, and that he was not entitled to an increase in his NEL award.

The worker commenced an application for judicial review. The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursued a further reconsideration.

The further reconsideration was denied by *Decision No.1791/07R2* (September 21, 2009).

The worker revived his application for judicial review. The application was heard in June 2010 by a Divisional Court Panel comprised of Justices Herold, Jennings and Lederman. At the outset of the hearing, the applicant abandoned the application in respect of the psychotraumatic disability award. The Court unanimously dismissed the application in respect of entitlement to benefits for carpal tunnel syndrome.

Although the time to seek leave to appeal a decision of the Divisional Court is 15 days, over 8 months later the worker brought a motion to extend the time to seek leave to appeal to the Court of Appeal. The Tribunal opposed the extension.

On March 30 Justice Karakatsanis denied the time extension. She noted there was no evidence the Applicant had formed the intent to seek leave to appeal within 15 days, the delay here was significant, his allegations about illness and being unable to find counsel were unsubstantiated and not compelling, there would be prejudice to the Tribunal if an extension was granted, and in any event there was no merit to the appeal.

**4. Decisions Nos.774/09 (April 21, 2009) and 774/09R (August 20, 2009)**

The plaintiff was the manager of an apartment building. His regular hours were 8 to 5, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action. The defendant commenced a section 31 application to determine whether the right of action was taken away under the Act.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, he was a worker in the course of his employment when the accident occurred. He fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit. The Tribunal has filed a factum. It is expected that this case will be heard in Ottawa in 2011.

**5. Decisions Nos.832/04 (November 18, 2004) and 832/04R (April 5, 2007)**

The worker left work due to back pain. Two weeks later the worker alleged the pain was due to an injury at work. The Board denied entitlement on the grounds it was not shown that an accident occurred in the course of employment.

The worker's appeal to the Tribunal was denied. The Vice-Chair noted the worker had a pre-existing non-compensable back condition, and there was an absence of any medical supporting the position that the back condition was caused by disablement from the nature of the work. The worker's alternative explanation that there was an accident involving carrying a ladder was not supported by the evidence.

The worker commenced an application for judicial review. The worker included with his application an affidavit alleging that comments made by the Vice-Chair prior to the hearing raise an apprehension of bias.

This French language judicial review was scheduled to be heard in Ottawa during the week of November 8, 2010 but was adjourned due to an illness in the family of counsel for the applicant. It is expected that a new date will be set during the next quarter.

**6. Decisions Nos.717/08 (April 30, 2008) and 717/08R (October 23, 2008)**

This is another French language judicial review to be heard in Ottawa.

The worker appealed to the Tribunal for an increase to his long-term earnings basis from May 2000 to January 2003. He also appealed the Board's finding that a suitable employment or business (SEB) for the worker would be a mail and message distribution occupation, as this finding had resulted in a reduction to his loss of earnings benefits. The Panel allowed the worker's appeal, directing the Board to recalculate the worker's long-term average earnings from May 2000 to January 2003, finding the SEB was not appropriate, and that his loss of earnings benefits should be based on a higher hourly wage.

However, the worker requested a reconsideration of the Tribunal decision, alleging the calculation of his long-term earnings should have been higher, the Panel should have

made the actual calculations rather than referring this to the Board, his short-term earnings should have been higher, and taking issue with some procedural rulings made by the Panel during his hearing.

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to determine the time periods on which the calculation of long-term earnings should be based. She found no error in referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short-term earnings because there was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker, who was representing himself, first attempted to commence an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who started an application for judicial review. The worker's counsel advised that she was revising the materials filed with the Court, but her application materials became muddled. The Ottawa Divisional Court had set a date for February 17, 2010, requiring the Tribunal to retain outside counsel in Ottawa to assist in bringing a motion for an order adjourning the judicial review and extending the time for filing a Record and factums. Justice Lalonde ordered that the matter not be set down for hearing without the order of the Court.

Counsel for the worker failed to abide by times indicated in the consent order to serve and file her materials. Despite the order of Justice Lalonde, through an error the Ottawa Divisional Court scheduled the judicial review to be heard during the week of November 8, 2010. The Tribunal was again required to retain outside counsel in Ottawa to resolve this matter. As a result of further representations to the Administrative Judge for the Ottawa Divisional Court, Justice deSousa ordered that the judicial review not go ahead during the week of November 8, and that further materials could be filed on behalf of the worker only with the prior approval of the Divisional Court.

Despite the above orders and the Applicant's failure to comply by the times in the consent order, the matter was listed for hearing in March 2011. At the end of the quarter counsel for the Applicant was preparing a motion to extend the time to file an amended factum.

**7. Decisions Nos.1248/98 (November 13, 2003) and 1248/98R (October 11, 2007)**

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He is self represented. The Tribunal filed its Record of Proceedings. The worker refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the

worker made to Tribunal staff, the Tribunal is not currently accepting further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the employer (the Tribunal's co-respondent) took no position on the request. The Court granted the request and the worker had until the end of June 2009 to perfect the judicial review application. He failed to perfect in time. In March 2010 the worker served the Tribunal with a Notice of Abandonment.

The next day the Tribunal was advised by the Divisional Court Office that the worker had changed his name, and filed a new judicial review application. The new application was the same as the one he had just abandoned, except that the worker now identified himself under his new name.

The employer indicated that it would bring a motion to strike the worker's new judicial review application. The Tribunal advised it would support that motion. As the worker indicated he was not available until November 2010, the motion was scheduled to be heard on November 10, 2010. In July 2010, the worker served a handwritten Notice of Abandonment of his latest judicial review, but despite repeated requests by both respondents he has failed to file it with the Divisional Court. In early November 2010, the co-respondent withdrew its motion to give the worker more time to file his Notice of Abandonment. In late November 2010, the co-respondent wrote to the worker to request that he file his Notice of Abandonment immediately or provide his availability over the next three months to have the motion heard. To date, the worker has not responded.

The Divisional Court sent a notice to the worker that it would dismiss the judicial review application administratively on April 14, 2011 if it is not perfected by that time.

**8. Decisions Nos.1509/02 (February 2, 2004), 1509/02R (September 27, 2006), 2021/07E (October 30, 2007) and 2021/07ER (July 22, 2009)**

Two sisters were suspended at the same time for smoking in a non-smoking area at work in 1999. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision 1384/03). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated, "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider Decision 1509/02.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. Decision 1509/02R was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in Decision 1509/02, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in Decision 1509/02 and the application for reconsideration was denied.

However, the Vice-Chair in Decision 1509/02R noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In Decision 2021/07E, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001 ARO decision was denied.

The worker commenced an application to reconsider Decision 2021/07E. In Decision 2021/07ER, released July 22, 2009, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision.

The Tribunal hearing on the recurrence was heard in October 2010. Decision 2021/07I was released on December 13, 2010. This decision granted the worker's appeal on the basis that her pain in 1999 was a recurrence of the 1992 injury. The worker was given four weeks to decide whether to also ask the Tribunal to address the period of entitlement for benefits for the recurrence.

The worker confirmed that she did not want to pursue this matter further.

The judicial review is still adjourned. The worker's representative has been asked if the judicial review will now be abandoned.

**9. Decisions Nos.1976/99I (November 30, 1999), 1976/99 (December 12, 2002) and 1976/99R (September 2, 2005)**

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992. The worker did not seek medical treatment from November 1991 until September 2004. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia.

The Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker suffered from a work injury, the medical reporting did not relate her condition to work, there was significant discrepancy in the medical reporting,

and her allegation of significant worsening from 1991 to 1994 suggests another intervening cause of her disability.

The worker commenced an application for judicial review. However she was represented by a paralegal from Quebec, who does not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. However her factum was improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court.

On October 12, 2010 Justice Linhares deSousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file such a factum.

On March 4, 2011 the worker's motion to be allowed to file a 55-page factum was heard by Justice Smith in Ottawa. Her request was not granted, but the Court did grant her 60 days to file a 45-page factum. The Tribunal was granted the right to file a 45-page factum in reply.

At the end of the quarter the Tribunal was waiting to receive the Applicant's revised factum.

**10. Decisions Nos. 1233/08 (June 9, 2008), 1233/08R (May 29, 2009) and 1233/08R2 (April 6, 2010)**

The worker brought an appeal for initial entitlement for respiratory irritation from workplace exposure to paint odours. He was granted initial entitlement and loss of earnings benefits for a few weeks. His appeals for permanent impairment and for psychological entitlement for stress were denied. The worker made a request for reconsideration which was denied.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum.

The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration.

The Tribunal released its reconsideration decision, Decision 1233/08R2. That decision found that the worker had not been given a full opportunity at the Tribunal to make submissions on the duration of benefits. The Tribunal's decisions were varied to have the matter of the duration of benefits remitted to the Board, subject to the parties' usual appeal rights.

A decision of the Board then confirmed the same few weeks of benefits. The worker's lawyer wrote to the Tribunal and suggested that he might revive the judicial review, but the Tribunal pointed out that that would be premature. It is expected that the worker will appeal the Board's decision. The judicial review is still on hold pending the worker's appeal.

**11. Decision No.2305/08 (November 18, 2008)**

The worker's appeal to the Tribunal for entitlement on the grounds she sustained a new injury, or aggravated a pre-existing condition at work, was denied. The worker commenced a judicial review alleging that the interpreter at the hearing did not properly interpret the proceedings for the Applicant.

The Tribunal filed its factum. The worker, who is self-represented, had originally demanded an early date for the judicial review. However a considerable period of time has now gone by without the worker confirming that she is available for a hearing.

In late 2010 the Tribunal was contacted by a lawyer who is now representing the worker, in regard to commencing a reconsideration application.

In this quarter there were discussions about the status of the judicial review. The Tribunal is currently waiting for the worker's lawyer to advise on the worker's intention in regard to the judicial review application.

**12. Decisions Nos.756/89L (December 11, 1989) and 756/89LR (October 3, 1990)**

In Decision 756/89L, the worker applied for leave to appeal a decision of the old WCB Appeal Board dated November 27, 1978. The Appeal Board decision denied the worker entitlement to benefits for a bilateral knee disability, which he claimed was related to a work accident in 1977. The Appeal Board did not accept that the worker had an accident as he alleged. The Appeal Board denied the worker's reconsideration requests on December 14, 1979; August 15, 1980; October 27, 1983 and September 5, 1984. Two reviews of the worker's file by the Ombudsman did not support that the worker's disability was related to a work accident.

Applying the statutory tests, in its December 1989 decision the Tribunal Panel denied leave, holding there was no substantial new evidence, and there was no reason to doubt the correctness of the Appeal Board's decision.

The worker applied to reconsider Decision 756/89L. The same Panel released Decision 756/89LR on October 3, 1990, which denied the reconsideration.

Over the succeeding twenty years, the worker made a series of further applications for reconsideration. In October of 2010 he commenced an application for judicial review.

The Tribunal is attempting to file a complete Record of Proceedings with the Divisional Court. The Tribunal is making its best efforts to obtain missing documentation for the Record.

**13. Decisions 1110/06 (November 2, 2006), 1565/08I (July 25, 2008), 1565/08 (May 13, 2020) and 1565/08R (February 9, 2011)**

The worker was injured in June 1990. He was granted an 18% NEL. He was granted a FEL sustainability award at D1 in 1992. He was also granted a FEL supplement while he

participated in a vocational rehabilitation program. He was undergoing a retraining program when he was involved in a motor vehicle accident in 1993, forcing him to quit the program. The supplement ended when he withdrew from the program.

At R1 in 1994 the worker was granted a FEL based on earnings which assumed he had been able to complete the training program.

In 1997 the Board ruled that the worker had recovered from the 1990 accident and his ongoing back problems were actually the result of a pre-existing condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal. He claimed he was entitled to a 100% FEL award as he was unable to earn anything in suitable and available employment as a result of the 1990 work accident.

In Decision 1110/06 the Tribunal determined the worker's pre-existing condition had been asymptomatic at the time of the 1990 injury, so the work injury was a significant factor contributing to the worker's ongoing impairment. The Panel held the worker had ongoing entitlement, that he had a permanent impairment, and that the entitlement to benefits he had at the time of the 1997 Board decision should be restored. The Board was directed to reinstate the worker's benefits and determine his past and ongoing benefits.

Following Decision 1110/06, in 2007 the Board made a new FEL determination. The Board found the worker was only partially disabled because of his work injury, and his inability to work was due to the 1993 motor vehicle accident. The Board reinstated the NEL, but did not grant a full FEL. The Board awarded a smaller FEL starting in 1993 as it determined he could work as a civil engineering technician. The worker appealed to the Tribunal again.

In Decision 1565/08I the Panel spent the first day of hearing considering the role of a person who appeared at the hearing with the worker and who characterized herself as a "facilitator." Following a lengthy discussion, it was decided that this person would characterize herself as a "friend" of the worker. As a friend she would qualify under the exemption for a representative as set out in *By-Law 4* passed pursuant to the *Law Society Act*. However the Panel brought the circumstances of the case to the attention of the Tribunal Chair.

When the hearing reconvened the Panel considered the worker's arguments that he was totally disabled before his motor vehicle accident, and hence he was entitled to a higher FEL.

In Decision 1565/08 the Panel found the worker was not totally permanently disabled before the motor vehicle accident. The motor vehicle accident had a significant impact on the worker. The Panel found that the worker's inability to earn beyond the level determined by the Board was because of the motor vehicle accident. As a result the Panel upheld the worker's D1 and R1 FEL award as determined by the Board.

However at the R2 date the Board had found the worker would have been able to earn more, and hence have a lower FEL. The Panel allowed the worker's appeal on that issue, finding his earning capacity would not have increased. Thus the worker was

entitled to a partial FEL commencing in 1993. The Panel also confirmed the Board's NEL determination.

In Decision 1565/08R a different Vice-Chair denied the worker's application to reconsider Decision 1565/08, finding the threshold to reconsider had not been met.

The worker has now commenced an application for judicial review of the above decisions. The worker is self-represented. The precise arguments which the worker intends to make are not yet apparent.

**14. Decision 3164/00 (December 18, 2000) and Decision 3164/00R (March 28, 2001)**

The worker was a baker. She injured her back in 1994. She was paid total benefits for about a month, when she returned to work, and for a recurrence for a further seven months. In 1997 she was granted entitlement for a right elbow disability arising out of her job duties.

She appealed for entitlement for a FEL and further vocational rehabilitation arising out of the back injury. She also appealed ongoing entitlement for the right elbow condition. Finally she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

The Vice-Chair granted entitlement to a FEL and vocational rehabilitation assistance for the back injury. He denied entitlement for fibromyalgia and the right arm/elbow.

On reconsideration the worker submitted additional medical documentation in support of her claim for fibromyalgia, but the Vice-Chair found it was insufficient to warrant re-opening the appeal. The worker made a number of subsequent reconsideration requests which did not meet the threshold to be assigned for review by another Panel or Vice-Chair.

In January of this year the worker retained new counsel and commenced an application for judicial review. It is not yet clear what the nature of the application will be. A concern about the timeliness of this application has been raised with counsel for the worker.

**Human Rights Complaint**

A worker was unhappy with her WSIAT decision. She brought an application to the Ontario Human Rights Tribunal, alleging discrimination on the basis of disability, sex and family status. When advised that the OHRT had no jurisdiction to contest an adjudicative decision of WSIAT, the worker then characterized her application as being about services, rather than the WSIAT decision itself.

WSIAT took the position that the worker's application had nothing to do with services, that it was in fact an attack on the merits of the WSIAT decision, and that the OHRT had no jurisdiction to consider an appeal of WSIAT's decision.

The OHRT Vice-Chair agreed that most of the worker's submissions appeared to relate to the results of the WSIAT decision and WSIAT's adjudicative process. However the OHRT Vice-Chair was unable to conclude that it was plain and obvious that the application did not fall within the Tribunal's jurisdiction. She directed the worker to file a more detailed statement of the alleged discrimination, which was to be provided to WSIAT.

WSIAT refused to file a complete response to the application. It filed a Request for an Order During Proceedings to dismiss the application on the grounds that the OHRT had no jurisdiction to consider the subject matter of the allegations. In the alternative WSIAT requested the application be deferred until the worker's request for reconsideration of the WSIAT decision had been completed.

The OHRT Vice-Chair granted WSIAT's request and dismissed the application on the basis that the OHRT had no jurisdiction to consider any of the allegations except for one, and for that allegation she agreed that it should be deferred until after the WSIAT reconsideration.

## Recent Decisions

### First Quarter 2011

### Right to Sue and Tribunal Jurisdiction over Subrogation

*Decision No. 2450/10* decided whether the plaintiff's right of action was taken away where the plaintiff alleged negligent treatment by the defendant doctor following a compensable injury.

The Vice-Chair held that negligent treatment after a compensable injury will be seen as a foreseeable consequence of that injury for purposes of determining the right to sue. However, in this case, the defendant agreed that he was not a worker of the hospital where he provided the treatment to the worker. Since the defendant was not a worker of a Schedule 1 employer under s. 28 of WSIA, the plaintiff's right of action was not taken away.

The plaintiff originally applied for, and received, benefits from the Board. The plaintiff then initiated the legal action. The right to continue the action was subject to the Board's right of subrogation under s. 30. The Board informed the plaintiff that it did not object to continuation of the action and waived repayment of the benefits granted to the plaintiff as a precondition of continuing the action.

The defendant submitted that the action should not be allowed to proceed until the plaintiff reimbursed the Board for the benefits paid. However, the Vice-Chair found that election and subrogation is covered in s. 30 of WSIA and since s. 123 provides that the Tribunal does not have jurisdiction over determinations made under s. 30, the Tribunal did not have jurisdiction to make such an order. The Vice-Chair found that even if the Tribunal had jurisdiction, there was no justification for requiring reimbursement.

### Entitlement for Heart Attack

In *Decision No. 1855/09*, the worker had a 40% NEL for a compensable heart attack he had suffered in 1988. He suffered a second, fatal heart attack in 2005. The issue was whether the worker had entitlement for the second heart attack.

One provision in the heart attack policy regarding entitlement on an aggravation basis in the case of unusual physical exertion, provides that, when entitlement is established, the condition has stabilized and a permanent disability evaluation has been conducted, further entitlement is not granted for a subsequent cardiac event unless there is a new work-related occurrence which merits allowance under a new claim. There is another provision in the heart attack policy regarding fatal claims. It provides that, if death occurs as the result of a new or progressive cardiac condition, the fatal claim is not accepted unless there is a new occurrence at work which merits allowance under a new claim.

The Panel found that the reference to a progressive cardiac condition is best interpreted as a reference to the progression of a non-compensable cardiac condition. The Panel found that since the worker's condition was not stable within the meaning of the policy when he died, the provision in the policy regarding aggravations which referred to the condition having stabilized did not bar entitlement.

The Panel found that while the worker's pre-existing coronary artery disease contributed to the fatal heart attack, the medical evidence established that the severe left ventricular dysfunction, which was due to his compensable 1988 heart attack, also made a significant contribution, and the Panel allowed entitlement.

**Transfer of Costs and Apportionment due to Negligence**

In *Decision No. 129/11* a worker of the appellant employer was installing drywall at a construction site when he touched live wires and was electrocuted. The issue in this appeal was whether the appellant employer was entitled to transfer the cost of the claim to the respondent employer who employed the electricians at the site.

The Panel applied the common law of negligence and found that a finding of negligence does not require a need for intention to cause harm. The Panel relied on the common law definition of "negligence" that negligence is the omitting to do something that a reasonable person would do or the doing something which a reasonable person would not do.

In this case, the appellant's worker put his hands on some live wires in order to move them aside. The Panel found it is the responsibility of the electricians to secure the wiring and render it safe for other trades. The injured worker was not in any way negligent when he inadvertently touched the live wires. The responsible electrician was negligent in failing to secure the wires. The Panel allowed the appeal and found that the full costs of the claim should be transferred from the account of the appellant to the account of the respondent.

**Bladder Cancer and Epidemiological Evidence**

*Decision No. 1659/09* examines whether the worker's exposure to organic solvents, paint aerosols and particulates during his work in the paint shop was a significant contributing factor in the development of bladder cancer. The worker was also a smoker.

The Panel obtained a report from a Tribunal medical assessor. The assessor noted that, according to the literature, there is evidence of increased risk of bladder cancer in employment as a construction labourer, mechanic or automobile assembly line worker. There is a growing body of literature concerning occupational exposure to paint and risk of bladder cancer. In assessing the roles played by smoking and the workplace exposure, the literature supported a role for each. The assessor referred to a study that conducted a meta-analysis and concluded that, after adjusting for tobacco use, residual confounding by tobacco use is unlikely and that occupational exposure as a painter is independently associated with the risk of bladder cancer.

The Panel found the meta-analysis to be persuasive and based on sound epidemiological studies. It was the most current study, and may not have been available to other doctors who gave opinions in this case. The Panel found the workplace exposure was a significant contributing factor to the worker's bladder cancer.

**Determining Earnings Basis and Personal Coverage**

In *Decision No. 2580/10* the worker was an independent operator truck driver with personal coverage. He suffered a back injury in 2003. The Board based the worker's benefits on net business income reported to Revenue Canada rather than the higher personal-coverage amount.

Prior to 1998, due to a series of changes in Board policy, there was some dispute regarding which Board policy applied. Based on the conflicting policies, prior Tribunal decisions granted benefits based on the amount of personal coverage, as long as that amount reflected a bona fide estimate of the amount the worker expected to earn.

The Vice-Chair found that the applicable policy now clearly states that average earnings are based on the amount of personal coverage or actual earnings at the time of the injury, whichever is less. Actual earnings are based on the income reported to Revenue Canada, with provision for over-estimating by adding back personal expenses. The Vice-Chair added back some expenses to the net business income reported to Revenue Canada but since this was less than the amount of personal coverage, the Vice-Chair found that actual earnings should be used as the worker's average earnings rather than the personal coverage amount.

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WSIAT